## IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK GUYTAN FRIAS,

Petitioner-Appellant,

v.

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,

Respondent-Appellee.

No. 20849

## BRIEF OF APPELLEE

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THOMAS C. LYNCH, Attorney General of the State of California

ROBERT R. GRANUCCI,
Deputy Attorney General

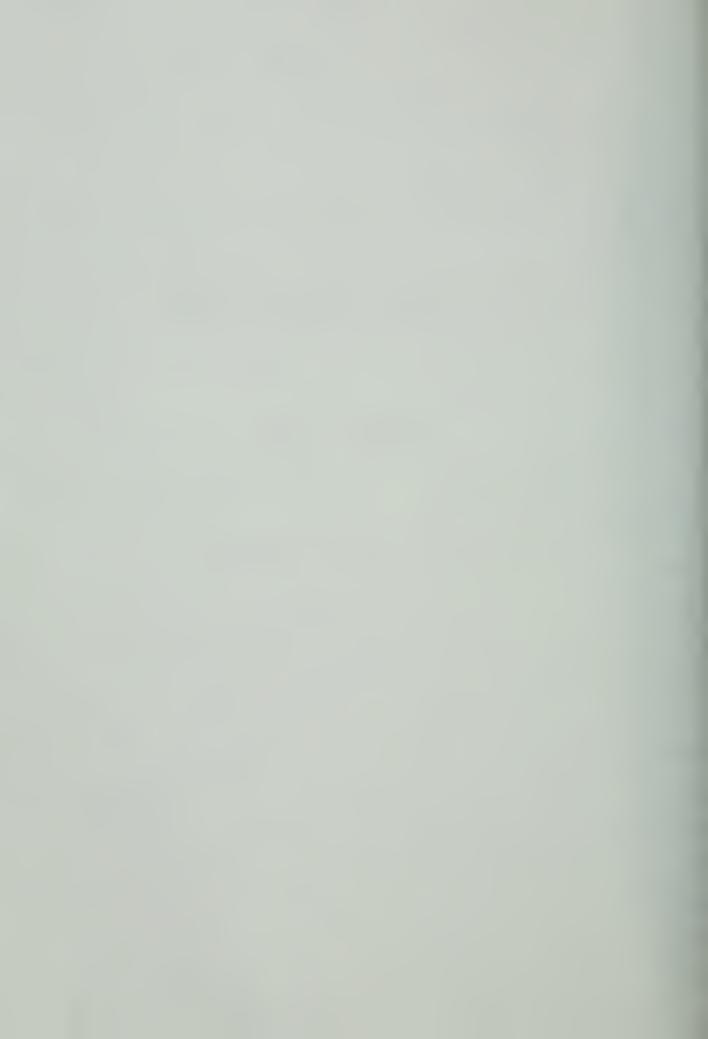
HORACE WHEATLEY,
Doputy Attorney General

6000 State Building San Francisco, California Telephone: 557-2848

Attorneys for Appellee



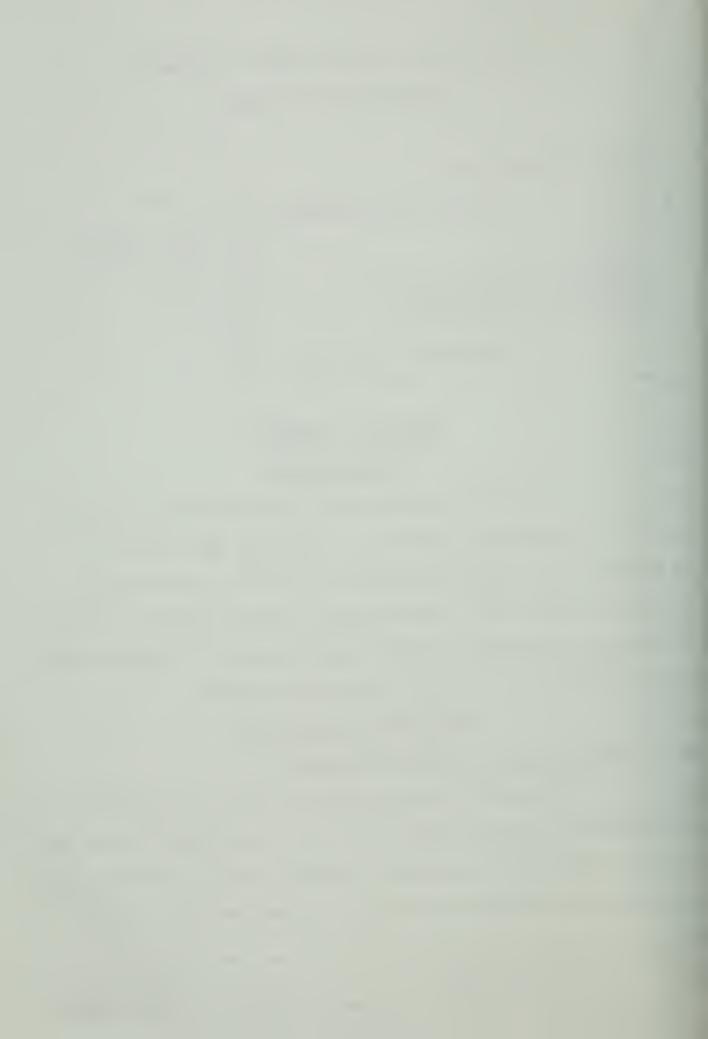
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                       BRIEF OF APPELLEE
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                          JURISDICTION
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             The jurisdiction of the United States District
14 Court to entertain appellant's petition for a writ of
15 habeas corpus was conferred by Title 28, United States
16 Code, section 2253, which makes a final order in a habeas
17 corpus proceeding reviewable in the Court of Appeals when
18 a certificate of probable cause has issued.
                     STATEMENT OF THE CASE
19
20 A.
      Proceedings in the state courts.
             Appellant, Frank Guytan Frias, was convicted of
21
22 violating section 11501 of the Health and Safety Code, to
23 Wit: furnishing a narcotic (heroin), after a trial by jury
24 during which he was represented by counsel (CT 5-10).^{-1}
25
        1. As hereinafter used, "CT" refers to the transcript of
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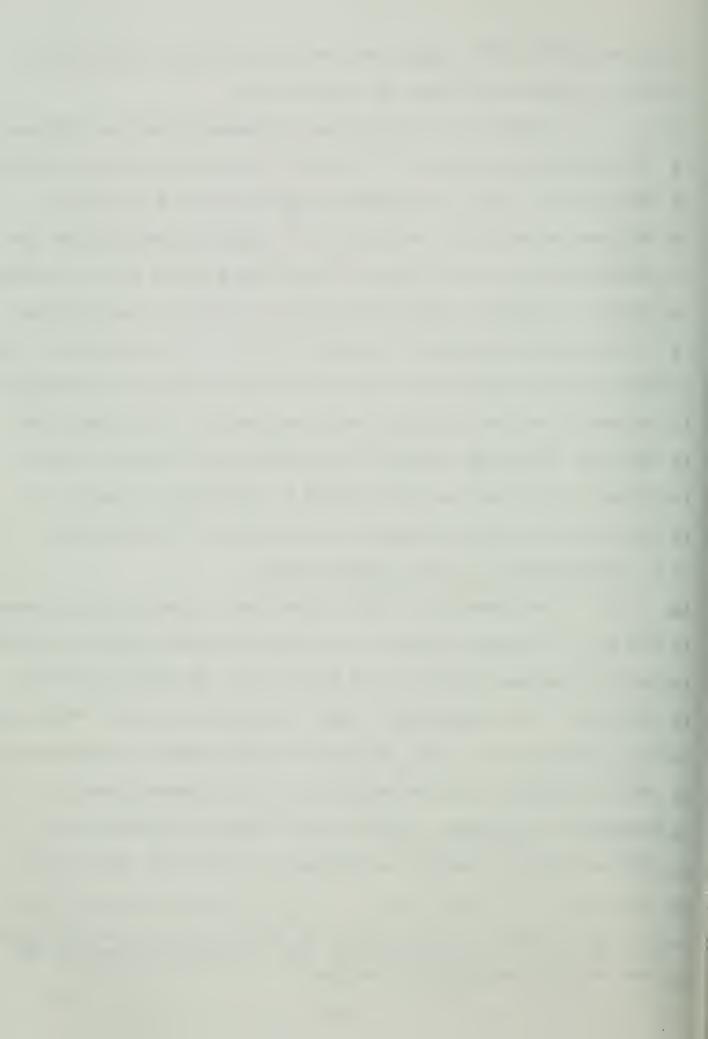
record filed in this Court, constituting the United States

District Court Clerk's record on appeal.



- 1 On March 29, 1963, appellant was sentenced to state prison
- 2 for the term prescribed by law (CT 12).
- 3 Appellant filed notice of appeal from the judgment
- 4 of conviction on April 8, 1963 (CT 13), and on July 28, 1964,
- 5 the District Court of Appeal of the State of California
- 6 affirmed appellant's conviction.  $\frac{2}{}$  Appellant petitioned the
- 7 Supreme Court of the State of California for a writ of habeas
- 8 corpus on August 4, 1965 (CT 14-22), said writ being denied
- 9 by that court on August 25, 1965 (CT 24). Substantially the
- 10 same factual and legal issue of allegedly illegal interrogation
- 11 presented to the District Court was raised in the petition
- 12 for writ of habeas corpus in the California Supreme Court,
- 13 though this issue was not raised in appellant's appeal to
- 14 the District Court of Appeal of the State of California.
- 15 B. Proceedings in the federal courts.
- On January 31, 1966, appellant filed an application
- 17 for writ of habeas corpus in the United States District Court
- 18 for the Northern District of California, Southern Division
- 19 (CT 1-13). On January 28, 1966, the District Court dismissed
- 20 the petition for a writ of habeas corpus filed by petitioner
- on the grounds that the decision of the Supreme Court in
- 22 Escobedo v. Illinois, 378 U.S. 478 (1964), did not apply
- 23 retroactively to affect petitioner's conviction which was

<sup>2.</sup> A copy of the opinion of the District Court of Appeal will be lodged with this Court for its consideration on the date set for hearing this matter.



- 1 final prior to the Escobedo decision, and that petitioner's
- 2 allegations were therefore devoid of merit (CT 35, 36).
- 3 However, on February 25, 1966, the court, pursuant to Title
- 4 28, United States Code, section 2253, certified that there
- 5 was probable cause for petitioner to appeal from the court's
- 6 order dismissing the petition for writ of habeas corpus, and
- 7 the court also granted petitioner's motion for leave to
- 8 appeal in forma pauperis, pursuant to Title 28, United States
- 9 Code, section 1915 (CT 48).

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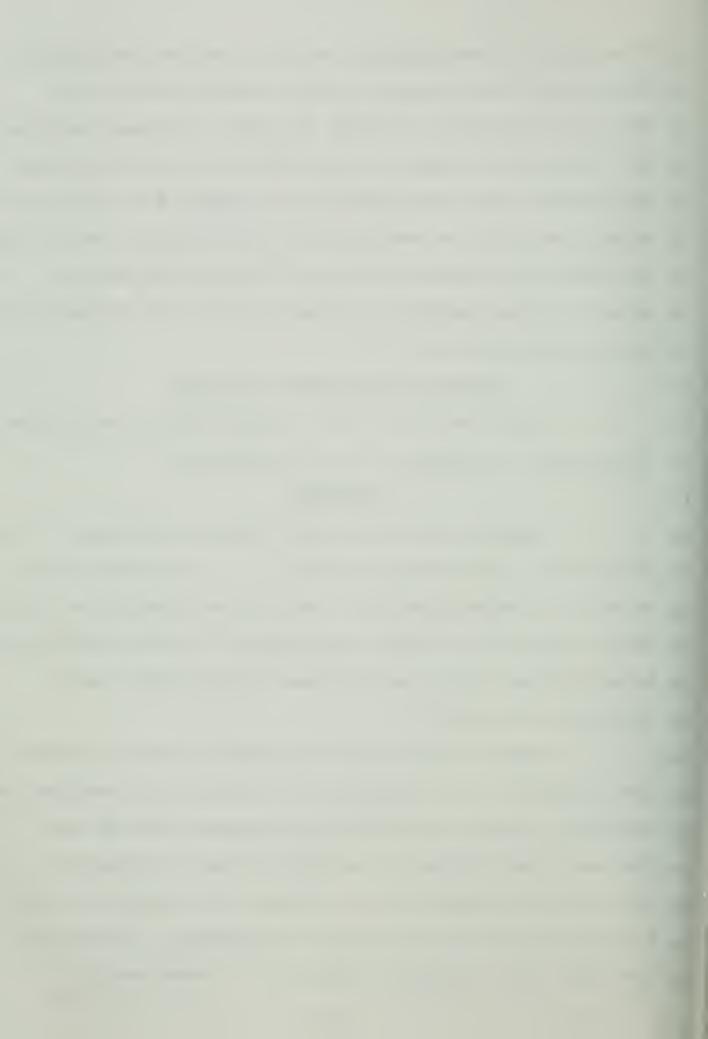
## SUMMARY OF APPELLEE'S ARGUMENT

Appellant's case does not fall within the purview of Escobedo v. Illinois, 378 U.S. 478 (1964).

## ARGUMENT

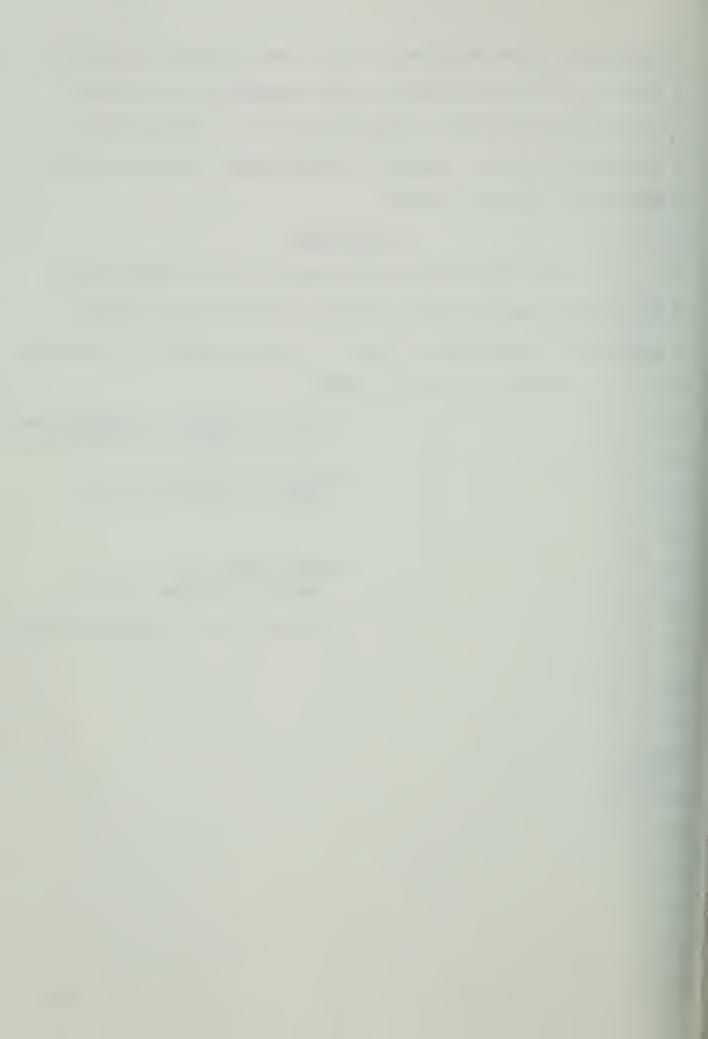
Appellant does not argue that his statement, "I am damn sorry I ever sold you heroin . . . ," was other than voluntary. Rather appellant asserts that since he was "the direct object of a police investigation," he was entitled to be admonished of his constitutional right against self-incrimination (AOB 7).

Appellant has not alleged that he was in custody, that the police were carrying out a process of interrogations designed to elicit incriminating statements when he made the questioned statement, and that he had requested and been denied an opportunity to consult with counsel so as to bring him within the protection of <a href="Escobedo">Escobedo</a>. And even had appellant made allegations identical to those made in



T	Escobedo, since appellant's trial was completed prior to
2	June 22, 1964, the date on which Escobedo was decided,
3	the exclusionary rule of <u>Escobedo</u> has no application to
4	appellant's case. Johnson v. New Jersey, 34 U.S.L. Week
5	4592 (U.S. June 20, 1966).
6	CONCLUSION
7	For the aforegoing reasons, it is respectfully
8	submitted that the order of the District Court denying
9	appellant's petition for writ of habeas corpus be affirmed.
0.	Dated: June 27, 1966.
.1	THOMAS C. LYNCH, Attorney Genera of the State of California
.2	ROBERT R. GRANUCCI, Deputy Attorney General
4	
.5	HORACE WHEATLEY, Deputy Attorney General
.6	Attorneys for Respondent-Appelle
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1	CERTIFICATE OF COUNSEL
2	I certify that in connection with the preparation
3	of this brief, I have examined Rules 18 and 19 of the United
4	States Court of Appeals for the Ninth Circuit and that in
5	my opinion this brief is in full compliance with these rules
6	Dated: San Francisco, California.
7	June 27, 1966
8	
9	HORACE WHEATLEY
10	Deputy Attorney General of the State of California
11	or the beate of Garriering
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